

THOMAS E. EDWARDS,	:	Order Affirming Decision in Part and
Appellant	:	Referring Appeal in Part to the Assistant
	:	Secretary - Indian Affairs
v.	:	
	:	Docket No. IBIA 95-61-A
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	December 15, 1995

Appellant Thomas E. Edwards seeks review of a November 30, 1994, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), denying his application to acquire in trust status land he owned in fee. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decision in part and refers this appeal in part to the Assistant Secretary - Indian Affairs for further consideration.

In March 1992, appellant, a member of the Confederated Tribes of the Colville Reservation, filed an application with the Superintendent, Puget Sound Agency, BIA (Superintendent), to have the United States acquire in trust for him land which he owned in fee. The land, described as Lot 33 of the Timber Bowl River Tracts, sec. 36, T. 32 N., R. 9 E., Willamette Meridian, and Lots 1, 2, and 3 of Block 5, Town of Darrington, Washington, is not located on any reservation. The Superintendent reviewed the application and forwarded it to the Area Director with the recommendation that the trust acquisition be approved. The Superintendent noted that appellant met the requirements of the Indian Reorganization Act, 25 U.S.C. § 465 (1994) (IRA), 1/ to have land taken into trust for him.

The Area Director denied the application on November 30, 1994, stating:

Title 25 of the Code of Federal Regulations, Part 151.3(b)(1) states:

Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian an trust status when the land is located **within the exterior boundaries of an Indian reservation, or adjacent thereto.**

Since the property is neither within the boundaries of the Reservations under the jurisdiction of Puget Sound Agency, nor adjacent to the Reservations, the proposed acquisition would be

1/ All further citations to the United States Code are to the 1994 edition.

in conflict with the regulations. We therefore must deny your application.
[Emphasis in original.]

Decision Letter at 1.

Appellant filed this appeal. Both appellant and the Area Director filed briefs. The Sauk-Suiattle Tribe (Tribe) supported appellant's appeal.

The Board has previously held that decisions whether to acquire land in trust status are committed to the discretion of BIA. The Board's review authority over BIA discretionary decisions is limited: It does not substitute its judgment for that of BIA, but rather reviews the matter to ensure that all legal prerequisites to the exercise of discretion were met. Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 195, 96 I.D. 328, 330, recon. denied, 18 IBIA 21 (1989).

Several of appellant's arguments challenge 25 CFR 151.3(b), the regulation governing trust acquisitions for individual Indians. Appellant argues that the regulation conflicts with the statutory authorization in 25 U.S.C. § 465, 2/ and contends for the first time in his reply brief that the regulation is invalid because it creates a distinction between tribes and individual Indians and because it limits the Secretary's discretion. The Board lacks authority to declare a duly promulgated Departmental regulation invalid. Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein. To the extent appellant is challenging 25 CFR 151.3(b), the Board cannot consider his arguments.

Appellant raises several general arguments which the Board addresses first. He argues that authority to approve off-reservation trust acquisitions has been delegated to agency superintendents, and that the Superintendent approved his trust acquisition. Therefore, appellant contends, the Area Director must accept the Superintendent's decision.

The Board disagrees. Agency superintendents have been delegated authority to accept fee-to-trust conveyances only when the land is located on a reservation. 10 BIAM Bulletin 13, sec. O(1)(b).

Knowing that he lacked authority to approve an off-reservation trust acquisition, the Superintendent did not attempt to do so. Instead, he referred the matter to the Area Director, with a recommendation that it be approved. Such a recommendation does not constitute approval of appellant's application.

Appellant also contends that the Area Director did not justify his decision, which was opposite the conclusion reached by the Superintendent.

2/ The Board is aware that 25 U.S.C. § 465 was held to be an unconstitutional delegation of legislative authority in South Dakota v. United States Department of the Interior, No. 94-2344 (8th Cir. Nov. 7, 1995). Questions concerning the possible impact of this decision would arise only if this trust acquisition were approved.

The Superintendent concluded that appellant qualified to have land acquired in trust for him under the IRA, but stated no conclusion concerning whether the land qualified for trust acquisition under the regulations in 25 CFR Part 151. The Area Director made no decision that was opposite any conclusion reached by the Superintendent.

Appellant also contends that his application should have been approved because it met all of the factors listed in 25 CFR 151.10. Because of its disposition of this case, the Board does not decide whether the application could have been approved under section 151.10. However, before reaching the factors in section 151.10, appellant must first show that his application met the threshold requirement that the land qualified to be taken into trust under section 151.3(b).

The Board therefore proceeds to consideration of 25 CFR 151.3(b).

Appellant does not dispute that 25 CFR 151.3(b)(1) requires that land to be taken into trust for an individual Indian must be located on or adjacent to a reservation, but rather presents an elaborate argument as to why the land he owns should be considered to be within a reservation or adjacent thereto because it is allegedly within the Tribe's land consolidation area and the acquisition is within the intent of Congress in enacting the IRA. The sum of appellant's argument, however, is an admission that the land is not located within any Indian reservation, and is in fact five to six miles from the closest land held in trust status

The fact that appellant's land may be located within the Tribe's land consolidation area does not equate with being "within the exterior boundaries of an Indian reservation" as required by 25 CFR 151.3(b)(1).

Appellant argues for the first time in his reply brief that his application would meet the requirements for acquiring land in trust for a tribe, and that he is attempting to acquire this land in trust for the future generations of his clan, the Edwards Clan of the Inchelium clan of the Arrow Lake Tribe of the Confederated Tribes of the Colville Indian Reservation. He states:

My Clan is a tribal entity whose membership is made up of full brothers and full sisters all who meet the half blood or more definition of Indians under the provisions of the * * * IRA. On May 24, 1987 our Clan met in general council, which to that date had no written constitution, and reorganized our general council form of government by adopting a written constitution which created a Council of Chiefs. I am the elected Chief of the Council of Chiefs.

Reply Brief at 6.

This argument appears to be that appellant and/or appellant as head of his clan is a "tribe," and therefore his application should have been considered under 25 CFR 151.3 (a), which governs trust acquisitions for tribes. Section 151.3(a) states:

(a) * * * [L]and may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or * * * (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

The Board has repeatedly stated that it is not required to consider arguments raised for the first time in a reply brief, because opposing parties have not had an opportunity to respond to those arguments. See, e.g., Lopez v. Acting Aberdeen Area Director, 29 IBIA 5, 10 (1995), and cases cited therein. However, as in Lopez, the Board finds that opposing parties will not be prejudiced if the Board considers this argument, because it is apparent that appellant's argument must fail.

"Tribe" is defined for purposes of 25 CFR Part 151 in section 151.2(b) as meaning "any Indian tribe, band, nation, pueblo, community rancheria, colony, or Other group of Indians, * * * which is recognized by the Secretary as eligible for the special programs and services from the [BIA]." A list of groups so recognized is published in the Federal Register. Appellant's clan is not listed. See 58 FR 54364 (Oct. 21, 1993). While appellant's clan is undoubtedly composed of individuals who are eligible for BIA services, the clan itself is merely a part of a tribe, it is not a tribe. The Board holds that appellant's application should not have been considered under 25 CFR 151.3(a).

The only remaining way appellant's application could be approved is if the land were held to be "adjacent" to a reservation within the meaning of 25 CFR 151.3(b)(1).

Appellant cites three cases in which land was acquired in trust in support of an argument that "adjacent" may be up to 45 miles away from a reservation. Two of the cases appellant cites, including the case in which the land acquired was located 45 miles from a reservation, concern acquisitions for tribes. As seen in the quotation of section 151.3(a) above, trust acquisitions for tribes are authorized when the land is within the tribe's land consolidation area or when it is determined that the acquisition will facilitate tribal self-determination, economic development, or Indian housing. Section 151.3(b) does not contain comparable provisions. The Board finds that, at least as relevant to this appeal, trust acquisitions under 25 CFR 151.3(a) and (b) are not analogous.

Appellant also cited Kautz v. Portland Area Director, 19 IBIA 305 (1991), which involved a trust acquisition for an individual Indian. Kautz is limited by its facts. The trust acquisition at issue there was approved prior to the promulgation of the regulations in 25 CFR Part 151, but was not completed because of an outstanding mortgage. When the appellant paid off the mortgage and approached BIA about actually taking the land into trust, BIA reviewed, and subsequently denied, the acquisition under the new regulations. The Board held that the new regulations in 25 CFR Part 151 should not be applied retroactively to invalidate a trust acquisition that had already been approved. Kautz does not support appellant's position.

In recent years the Board has considered three requests from individual Indians for fee-to-trust acquisitions in the Portland Area. In each case, the Area Director denied the acquisition on the grounds that the land to be acquired was not located adjacent to a reservation. In Maahs v. Acting Portland Area Director, 22 IBIA 294 (1992), the land was apparently separated from the Tulalip Reservation by a 30-foot-wide road; while in Cross v. Acting Portland Area Director, 23 IBIA 149 (1993), the land was located about ½ mile from the Muckleshoot Reservation; and in McCloud v. Acting Portland Area Director, 23 IBIA 203, 204 (1993), the appellant stated that the land was located "within the 20 mile radius of Puyallup Reservation."

In Maahs, 22 IBIA at 296, the Board observed:

The term "adjacent," which is not defined in 25 CFR Part 151, is a term of flexible meaning, as reflected in the definition in Black's Law Dictionary (5th ed. 1979): "Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch." [Emphasis in original.]

The Board vacated the decision in Maahs, and remanded the matter to the Area Director for further development of the record through a determination of the exact location of the property. Following the Board's remand in Maahs, the Area Director requested guidance from the Deputy Commissioner of Indian Affairs concerning the interpretation of "adjacent" as it is used in 25 CFR 151.3(b)(1). Based on the Area Director's request to the Deputy Commissioner, the Board referred both Cross and McCloud to the Assistant Secretary - Indian Affairs, stating in Cross that "[i]n light of the discretionary nature of the trust acquisition authority, and the Board's limited review authority * * *, the Board is reluctant to impose an interpretation of the term 'adjacent' upon BIA" (23 IBIA at 153).

The Area Director does not state that he has received a response from either the Assistant Secretary or the Deputy Commissioner concerning the interpretation of "adjacent," nor does the administrative record contain any communication relating to this issue. The Board has not independently been advised of any such decision. Accordingly, the Board deems it appropriate to also refer this matter to the Assistant Secretary for her consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Area Director's November 30, 1994, decision is affirmed in Part, as discussed in this opinion. The matter is referred to the Assistant Secretary - Indian Affairs for consideration of whether the land appellant seeks to have acquired in trust is "adjacent," to a reservation within the meaning of 25 CFR 151.3(b)(1). The Assistant Secretary is requested to provide the Board with a copy of her decision when it is issued.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge